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No. 82-738

In The

Supreme Court of the United States

October Term, 1982

DR. ETHEL D. MIGRA,

Petitioner,

vs.

WARREN CITY SCHOOL DISTRICT
BOARD OF EDUCATION, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

JOHN R. VINTILLA
FRANCIS X. COOK

112 Plaza West Building
20220 Center Ridge Road
Cleveland, Ohio 44116
Telephone (216) 781-3352

Counsel for Petitioner

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

QUESTIONS PRESENTED

1. Where the only issue judicially acted upon and decided by a state court involved the breach of a teacher's employment contract, is the prevailing teacher precluded from instituting a civil rights suit in the federal court under 42 U. S. C., Sections 1983 and 1985, against the Board of Education and its members—state court defendants?

2. Where a teacher is terminated without a hearing in violation of the contract of employment, under circumstances implicating her good name, reputation, honor or integrity, does the federal court have jurisdiction of a civil rights action to vindicate the teacher's liberty and property interests as secured to her by the Fourteenth Amendment?

3. Whether parties to a state court action could raise the defense of res judicata or collateral estoppel in a civil rights suit involving federal claims that were not raised and did not arise in the earlier action, although they could have been submitted and litigated under the concurrent jurisdiction of the state court?

PARTIES TO PROCEEDING

The parties to this proceeding are those contained in the caption of the case, to-wit: Dr. Ethel D. Migra, The Warren City School District Board of Education, Catherine O. Swan, Henry J. Angelo, Willard T. Reuben, Raymond Tesner, Mary Milheim, Barbara Miller, and Robert Peques.

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OPINIONS BELOW

The court of appeals did not render an opinion. The opinion of the district court (Pet. App. pp. C-17 - C-31) is not reported.

JURISDICTION

The order of the court of appeals (Pet. App. p. A-15) was entered on June 3, 1982. A petition for rehearing with a suggestion for rehearing *en banc* was denied on July 27, 1982 (Pet. App. p. B-16). The petition for a writ of certiorari was filed on October 19, 1982, and was granted on January 10, 1983. The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

STATEMENT

This suit was filed in the district court pursuant to Sections 1983 and 1985 of Title 42 of the United States Code, and the jurisdictional counterpart, 28 U. S. C., Sections 1331 (a) and 1343 (3) to vindicate the deprivation of the constitutional rights of Dr. Ethel D. Migra, petitioner herein, under the First, Fifth and Fourteenth Amendments to the Constitution of the United States. The defendants in the action are the Warren City School District Board of Education and certain individuals who were members of the Board at the time relevant hereto and others, including the superintendent of the school district, respondents herein.

Petitioner, Dr. Migra, had been an employee of the Warren City School District Board of Education (hereinafter Board) ever since August, 1976, and until the occurrence of the events which have given rise to the instant suit. She was employed as a supervisor of elementary education for the school district on a yearly basis. On

April 17, 1979, at the regular meeting of the Board, with all five members present, a resolution was adopted unanimously to renew the employment of Dr. Migra for the ensuing school year of 1979-1980 (App. p. 30). One week thereafter, on April 24, 1979, the Board held a special meeting at which it rescinded its resolution of April 17, 1979, to renew the petitioner's contract of employment by a vote of three to one (App. pp. 31, 32). The fifth member of the Board, a Mr. Culver, was not notified that the special meeting would reconsider Dr. Migra's employment, and he did not receive written notice of the special board meeting of April 24, 1979. Culver learned for the first time, after he returned from Miami, Florida, on April 25, 1979, where he attended a National School Boards Convention as a delegate of the Board (App. pp. 31, 47, 48), that the special meeting had dealt with and had terminated Dr. Migra's employment. Prior to the special meeting of April 24, 1979, wherein the Board resolved to terminate the petitioner's employment, the petitioner had accepted the April 17, 1979, resolution of the Board to continue her employment (App. pp. 30, 31).

As a result of the termination of the employment, the petitioner brought suit in the Common Pleas Court of Trumbull County, Ohio, against the Board and the members who voted to terminate her employment. The complaint asserted, in essence, two causes of action, namely, (1) breach of the employment contract by the Board, and (2) the wrongful interference by the individual members of the Board with the petitioner's contract of employment (App. p. 25).

At the trial of the action, the state court sua sponte "reserved and continued" the petitioner's claim of con-

spiracy and only adjudicated the issue regarding the validity of the petitioner's termination by the Board. The court did not try the tort liability claim against the individual members of the Board (App. p. 39). Following a bench trial, the state court adjudged and decreed that the April 24, 1979, special meeting was invalid and of no force and effect (App. pp. 49, 50), that the petitioner had duly accepted the April 17, 1979, resolution to continue her employment (App. pp. 30, 31), that the acceptance constituted a binding contract between the petitioner and the Board (App. pp. 33, 34, 35, 36, 43), and that the Board's action terminating the petitioner was contrary to law (App. pp. 44, 45, 49, 50). Subsequently, the state court dismissed the tort claim against the individual respondents without prejudice at the petitioner's request (App. pp. 53, 54).

On July 10, 1980, the petitioner filed the instant action against the respondents in the United States District Court for the Northern District of Ohio (App. pp. 3-12), and, in due course, the respondents filed their answers to the complaint (App. pp. 13, 16). Shortly, thereafter, the respondents submitted motions for summary judgment on the basis of res judicata and the statute of limitation (App. pp. 21, 22, 23). The district court granted summary judgment for the respondents and dismissed the complaint (Pet. App. pp. C-17-31, D-32). The district court also dismissed the petitioner's claim of entitlement to continued employment for failure to state a claim upon which relief may be granted (Pet. App. p. C-31). The Sixth Circuit Court of Appeals, in a one-page order, affirmed the judgment below (Pet. App. p. A-15). The petition for rehearing with a suggestion for an *en banc* hearing was also denied (Pet. App. p. B-16).

SUMMARY OF ARGUMENT

I. In *Allen v. McCurry,* (1980) 449 U.S. 90, this Court declared that the doctrines of res judicata and collateral estoppel apply to actions filed pursuant to 42 U.S.C., Section 1983. Allen dealt solely with the traditional principle of "collateral estoppel," or, as it is also referred to, "issue preclusion." Generally stated, collateral estoppel bars a party from contesting in a subsequent proceeding any issue of fact actually litigated and determined by a previous final judgment rendered by a court of competent jurisdiction. *Montana v. United States,* 440 U.S. 147, 153. The Court in Allen declared that ". . . [T]he federal courts have traditionally adhered to the related doctrines of res judicata and collateral estoppel."

Res judicata, otherwise referred to as "claim preclusion," is the basis given for the decision below. The conventional elements of the doctrine of res judicata are generally stated to be: (1) a final judgment on the merits in an earlier action; (2) an identity of the cause of action in both the earlier and the later suits; and (3) an identity of parties or their privies in the two suits.

The essential element of res judicata which emerges from the earliest of cases and which is critical to the determination of the present case is that the cause of action or claim must be the same as that in which the judgment had been rendered. The courts and commentators alike are agreed that under the doctrine of res judicata, a judgment on the merits in a prior suit involving the same parties or their privies bars a second suit based on the same cause of action. A final judgment is a judgment which brings a suit to conclusion. It is the judgment

which bars recovery in any other litigation between the same parties on the same claim or cause of action.

Allen and also the later case of *Kremer v. Chemical Construction Corp.*, — U. S. —, 102 S. Ct. 1883 (1982), both relied on 28 U. S. C., Section 1738, which requires federal courts to give the same conclusive effect to state court judgments "as they have by law or usage in the courts of such state." Ohio adheres to this traditional rule of res judicata, 32 O. Jur. 2d, *Judgments,* Sections 225, 226; *Norwood v. McDonald,* 142 Ohio St. 299 (1943); *Trautwein v. Sorgenfrei,* 58 Ohio St. 2d 493 (1979). If the claim or cause of action sued on in the state court involves non-federal matters, the judgment of the state court is not "on the merits" as to the federal claims subsequently brought in federal court; and, therefore, the bar of res judicata is not applicable in the federal action.

II. The federal suit alleges that the respondents conspired to deprive the petitioner of the rights guaranteed by the Constitution of the United States, for which deprivation she seeks relief under 42 U. S. C., Sections 1983 and 1985. The First Amendment and Fourteenth Amendment claims would not be barred under the traditional doctrine of res judicata due to the difference in the causes of action in the two cases. The pivotal question relative to such allegations is whether the circumstances of the discharge of the petitioner, whereby she lost her position of employment, so blackened her name as to impair the liberty interest in her good name, reputation, honor and integrity and in her professional reputation. A civil rights plaintiff has a due process right not to be subjected to defamatory and stigmatizing public charges which occurred in the "course of his discharge," without being afforded the right to a

"name-clearing hearing." *Owens v. City of Independence,* 445 U. S. 622 (1980); *Codd v. Velger,* 429 U. S. 631; *Board of Regents v. Roth,* 408 U. S. 564 (1972); *Perry v. Sinderman,* 408 U. S. 593 (1972). The district court characterized the allegations implicating the liberty interest of the petitioner in this respect as being an action in defamation that "arises from the same claim and set of circumstances which were litigated in the state court, and, therefore, the claim is barred both by res judicata and by the statute of limitations."

Ohio law regards the conspiracy for an unlawful purpose, rather than the slander, to be the substantive ground of recovery. Ohio follows the generally accepted doctrine that persons uttering slanders in pursuance of a conspiracy to slander, and all other members of the conspiracy as well, may be held jointly liable. In Ohio, therefore, the conspiracy action is not barred by the statute applicable to libel and slander. 34 O. Jur., *Libel and Slander,* Section 129; *Zurhorst v. Kroll,* 10 OCC (NS) 228; *Slavinas v. Ambrose,* 27 NP (NS) 279; *Schoedler v. Gauge & E. Co.,* 134 Ohio St. 78.

ARGUMENT

The adjudication by a state court of an action based on the statutes and the common law of the state does not bar a civil rights action in federal court between the same parties on matters that were not litigated and which were not essential to the issues or points in controversy in the state court.

Throughout the argument we shall refer to the decision of the district court inasmuch as the circuit court of

appeals adopted the decision in toto without rendering an independent opinion.

The principle issue in this case is whether the traditional doctrine of res judicata bars the petitioner from instituting a civil rights action in the federal court pursuant to 42 U. S. C., Sections 1983 and 1985, by reason of a former action between the same parties in the state court which involved and was adjudicated upon statutory and common law issues. The district court determined that the petitioner's claims in the instant action could have been fully litigated between the parties in the state court action, and that, therefore, the petitioner is barred from asserting them in the present case.

It is important to note that the district court applied the bar of res judicata to all the federal claims of the complaint, with the exception of the claim regarding the denial of employment to the petitioner beyond the 1979-1980 school year. As to that claim, the court found that the complaint fails to state a claim for relief.

In order that the decisions below may be viewed in the proper perspective, it is necessary to consider carefully the traditional doctrine of res judicata. A succinct statement of the principle is to be found in the authoritative text, *Freeman on Judgments,* Fifth Ed., Vol. 2, Section 627, page 1323, wherein the author declared:

> As stated by Lord Chief Justice de Grey in the Duchess of Kingston's Case, which has been quoted innumerable times, *"the judgment of a court of concurrent jurisdiction, directly upon the point,* is as a plea, a bar, or as evidence, *conclusive between the same parties upon the same matter, directly in question in another court;* secondly, *that the judgment* of a court of exclusive jurisdiction *directly upon the point* is, in like

> manner, conclusive *upon the same matter* between the parties, coming incidentally in question in another court, for a different purpose. (Italics ours.)

Moore's Federal Practice, Second Edition, states the principles underlying res judicata at page 621 in Volume 1B, as follows:

> The term *res judicata* is often used to denote two things: (1) that such a judgment, *when rendered on the merits,* is an absolute bar to a subsequent action, between the same parties or those in privity with them, *upon the same claim or demand;* and (2) that such a judgment constitutes an estoppel between the same parties or those in privity with them, as to matters that were necessarily litigated and determined although the claim or demand in the subsequent action is different. *Under the first proposition the judgment operates as a bar—prevents relitigation of all grounds for, or defenses to, recovery that were then available to the parties before the particular court rendering the judgment, in relation to the same claim—regardless of whether all grounds for recovery or defenses were judicially determined.* Under the second proposition the judgment prevents the parties from relitigating only those matters that were determined. (Italics ours.)

The principle which governs the preclusion issue in the present case, wherein the second action between the parties is upon a different claim, was enunciated in *Mercoid Corporation v. Mid-Continent Co.,* 320 U. S. 661, 671:

> The case is governed by the principle that *where the second cause of action between the parties is upon a different claim the prior judgment is res judicata not as to issues which might have been tendered* "but only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered." *Cromwell v. County of Sac,* 94 U. S. 353, 354. *Russell v. Place,* 94 U. S. 606. (Italics ours.)

Cromwell v. County of Sac, 94 U. S. 351 (1876), is the leading American case on the subject of res judicata and collateral estoppel. After illustrating the difference in the two principles—res judicata and collateral estoppel—the Court defined the basic criteria inherent in the preclusive effect of res judicata. Since we believe that the *Cromwell* definition is crucial to the proper determination of the preclusion question before this Court, we invite the Court's attention to the declaration at page 353, as follows:

> The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever. But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. *In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action.* (Italics ours.)

Thus, Cromwell sets forth the proper application of the statement that a judgment estops not only the issue actually presented in the action, but also every issue which

might have been presented. This statement is often misconstrued and misapplied by the courts. *Coogan v. Cincinnati Bar Ass'n.*, 431 F. 2d 1209 (6 Cir. 1970); *Lee v. City of Peoria*, 685 F. 2d 196 (1982). According to Cromwell, such a statement is "strictly accurate" only "when applied to the demand or claim in controversy." Or, as stated by this Court in Mercoid Corporation, a prior judgment is conclusive *in an action between the same parties on a different claim*, "not as to issues which might have been tendered, but only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered."

Applying Cromwell and Mercoid to the facts and circumstances of the instant case, it becomes evident that the only claim or demand that the petitioner is precluded from bringing against the respondents is the claim or demand which had been in controversy and upon which the state court rendered judgment. The state court action involved the single claim that the discharge of the petitioner was accomplished contrary to the statutory and common law of Ohio. This claim is the only one which had been litigated and which had passed into judgment in the prior action in the state court. The judgment on such a claim constitutes the bar to a subsequent action between the same parties. It is the claim upon which the judgment was rendered that may not be relitigated in a second action between the same parties. Thus, the crucial consideration regarding res judicata is whether the claim or demand of the second action between the same parties is predicated upon a different claim or demand from that which had been controverted and passed into judgment in the earlier case.

The record herein clearly demonstrates that the federal claims of the within cause had not been in controversy and did not pass into judgment in the state court action between the parties in the federal court. The two cases involve distinct causes of action and were intended to address different types of wrongdoing.

The only rule which emerges from *Allen v. McCurry* is that Section 1983 presents no categorical bar to the application of res judicata and collateral estoppel concepts. 449 U. S. at 97, n. 10. However, nothing in Allen, or other decisions of this Court which we could find on the subject, requires a departure from the fundamental precept of res judicata—that the subsequent suit must involve the same cause of action, and that the bar is applicable only as to those claims or demands which were in controversy and upon which the determination of the judgment was rendered in a prior action. Where there has not been a judicial determination by the state court on the merits of the specific claims in the federal complaint, a plaintiff's action will not be barred by res judicata. If the legal matters determined in the earlier case differ from the issues raised in the second case, then, clearly, res judicata has no bearing on the situation. The author of *Black's Law Dictionary,* Fifth Edition, correctly and precisely defines the legal connotation of *res judicata* as follows:

> **A matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgment. Rule that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action.**

> And to be applicable, requires identity in thing sued for as well as identity of cause of action, and of quality in persons for or against whom claim is made. The sum and substance of the whole rule is that a matter once judicially decided is finally decided. (Citations omitted.)

This rule was reiterated by Justice Brennan in *Kremer v. Chemical Construction Corp.*, — U. S. —, n. 22, 102 S. Ct. 1883, 1887 (1982), as follows:

> It is a basic principle of the preclusion doctrine (citations omitted), that a decision in one judicial proceeding cannot bar a subsequent suit raising issues that were not relevant to the first decision.

The record in this case makes it abundantly clear that the elements of a civil rights action, as contained in the federal complaint, are not identical or relevant to the issues which led to the state court judgment.

The fundamental question is: Was the issue or were the issues decided in the prior adjudication identical with those presented in the present suit? Stated otherwise: Were the federal claims judicially acted upon or decided? Were they settled by the state court judgment? In the state court, petitioner asserted and litigated the right to continued employment by reason of the laws of Ohio. Following a bench trial, the state court adjudged and decreed that the petitioner had a binding contract of employment which had been breached by the Board, resulting in damages to the petitioner.

The state court complaint also asserted a common law claim of conspiracy against the individual defendants which the state court, sua sponte, "reserved and continued" at the outset of the trial. This claim was subsequently dismissed without prejudice. Thus, in allowing the volun-

tary dismissal without prejudice of the tort claim, the state judge expressly reserved the petitioner's right to maintain the second action. The issues adjudicated in the Common Pleas Court of Trumbull County, Ohio, are not at all the equivalent of a Section 1983 proceeding. Therefore, it is clearly evident, we believe, that the constitutional claims of the present action are not barred. The state claim which was dismissed was for illegal interference and conspiracy to interfere with petitioner's employment. The tortious acts of the respondents furnish the grounds for the violation of the petitioner's constitutional rights as charged in the complaint. Whether these wrongful acts subject the respondents to liability under the Civil Rights Act, 42 U. S. C., Section 1983, is no longer in dispute, as a result of the decisions of the Court. In this connection, the Court in *Carey v. Piphus,* (1978) 435 U. S. 247, 253, declared:

> The legislative history of Section 1983 . . . demonstrates that it was intended to "create a species of tort liability" in favor of persons who are deprived of "rights, privileges or immunities secured to them by the Constitution."

Ohio follows and adheres to the traditional doctrine of res judicata as expressed by the common law and enunciated by this Court in Cromwell v. County of Sac, 94 U. S. 351.

The Full Faith and Credit Act, 28 U. S. C., Section 1738, requires the federal courts to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the state from which the judgments emerged. *Kremer v. Chemical Construction Corp.,* — U. S. —, 102 S. Ct. 1883, 1889; *Allen v. Mc-*

Curry, 449 U. S. 90, 94. In Kremer this Court explained that the words of the Full Faith and Credit Act are to be taken at face value, to wit:

> It has long been established that Section 1738 does not allow federal courts to employ their own rules of res judicata in determining the effect of state judgments. Rather, it goes beycnd the common law and commands a federal court to accept the rules chosen by the state from which the judgment is taken.

The Ohio rule on res judicata and collateral estoppel is expressed in *Norwood v. McDonald*, (1943) 142 Ohio St. 299, and *Whitehead v. General Tel. Co.*, (1969) 20 Ohio St. 2d 108. These decisions represent the generally accepted and traditional views on preclusion as we have shown herein. Paragraphs 1 and 2 of the syllabus in Whitehead state:

> 1. A final judgment or decree rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of rights, questions and facts in issue as to the parties and their privies, and is a complete bar to any subsequent action upon the same cause of action between the parties or those in privity with them. The prior judgment is *res judicata* as between the parties or their privies. (Paragraph No. 1 of syllabus of *Norwood v. McDonald*, 142 Ohio St., 299, approved and followed.)
>
> 2. A final judgment or decree in an action does not bar a subsequent action where the causes of action are not the same, even though each action relates to the same subject matter. However, *a point of law or a fact which was actually and directly in issue in the former action, and was there passed upon and determined by a court of competent jurisdiction, may not be drawn in question in a subsequent action between the same parties or their privies.* The prior

> judgment estops a party, or a person in privity with him, from subsequently relitigating the identical issue raised in the prior action. (Paragraphs Nos. 2 and 3 of the syllabus of *Norwood v. McDonald*, 142 Ohio St. 299, approved and followed.) (Emphasis of the Court.)

The Supreme Court of Ohio had occasion to review and to reaffirm Norwood and Whitehead in *Trautwein v. Sorgenfrei*, (1979) 58 Ohio St. 2d 493.

The critical language of the res judicata rule as applied in Ohio is that "a final judgment or decree in an action does not bar a subsequent action where the causes of action are not the same, even though each action relates to the same subject matter." It is imperative that there be an identity of the cause of action or claim in the subsequent suit with that of the prior action. The district court assumed that the cause of action in the within case is identical with the cause of action in the state court suit between the parties, simply because both cases relate to the same subject matter involving the Board and certain members thereof. However, even though the two cases relate to the same subject matter, they are separate causes of action. *Jones v. Petruska*, (1979) 13 O. O. 3d 111. The state court action was adjudicated upon the statutory law of Ohio and the common law issue of breach of contract, whereas our case is a civil rights action which is predicated on federal claims under Sections 1983 and 1985 and the Constitution of the United States.

The doctrine of res judicata also embraces the policy that a party must make good his cause of action or establish his defenses, ". . . by all the proper means within his control, and if he fails in that respect, purposely or negligently, he will not afterward be permitted to deny the

correctness of the determination nor relitigate the same matters between the same parties." *Covington & Cincinnati Bridge Co. v. Sargent,* (1875) 27 Ohio St. 233. The petitioner is not seeking to deny the correctness of the state court judgment, nor is she seeking to relitigate the same matters which have been adjudicated by, or could have been litigated in, the state court. Admittedly, a party cannot escape the preclusive effect of res judicata by asserting his own failure to raise matters clearly within the scope of the prior proceeding.

The statement of the Fifth Circuit in *Exhibits Poster Exch., Inc. v. National Screen Service Corp.,* (1970) 421 F. 2d 1313, is especially appropriate in consideration of res judicata regarding this particular controversy. The court said:

> The defendants pressed these doctrines in the District Court as though they were to be used as clubs to accomplish the policy embedded in them: the prevention of repetitive litigation. *The doctrines must be used, however, not as clubs but as fine instruments that protect the litigator's right to a hearing as well as his adversary and the courts from repetitive litigation.* (Italics ours.)

Petitioner's First Amendment claim is not barred by the judgment of the state court.

The district court concluded that the petitioner's "First Amendment claim was not actually litigated in the prior suit;" nonetheless, it found that although a plaintiff "may bring her constitutional claims in the federal court, the Sixth Circuit has held that state courts are competent to decide questions arising under the federal constitution (citations omitted)." The district court thereupon de-

cided that "The plaintiff could have brought her First Amendment claim in the state court and she is, therefore, barred from asserting it here." (Citation omitted.) The conclusion that a state court is empowered to decide questions arising under the federal constitution bears no legal significance in the res judicata controversy of this case. If the right and the delict which are involved relative to the petitioner's First Amendment claim have not been adjudicated, the defense of res judicata is unavailable.

The discharge of the petitioner caused injury to her reputation, implicating liberty and property interests sufficient to invoke the procedural protection of the due process clause of the Fourteenth Amendment.

The district court found that the allegations of the complaint involving the "good name, reputation, honor and integrity" of the petitioner amount to no more than a claim of defamation. With no name-clearing hearing accorded the petitioner, the district court held, nevertheless, that the bar of res judicata was appropriate to the claim of stigmatization because it "arises from the same claim and set of circumstances which were litigated in the state court." The court, therefore, decided that the claim is barred by res judicata, and also by the statute of limitations of Ohio.

In *Paul v. Davis*, 424 U. S. 693, 709-710, this Court has held that an injury to reputation had not resulted in a deprivation of liberty because it was not associated with the termination of employment. In the instant case a more tangible interest, other than reputation alone, is involved—the loss of employment.

The complaint's allegations of civil rights violations are broader than the common-law tort of defamation. The appropriate and effective response to the rationale of the lower courts is to be found in the concurring opinion of Justice Harlan in *Monroe v. Pape,* 365 U. S. 167, wherein he declared:

> . . . [A] deprivation of a constitutional right is significantly different from and more serious than a violation of a state right, and, therefore, deserves a different remedy even though the same act may constitute a state tort and the deprivation of a constitutional right.

After finding that the claim of reputational injury is barred by the statute of limitations, the district court applied "the most analogous state statute of limitations to the underlying constitutional claim," Section 2305.11 of the Ohio Revised Code. This provision requires that an action for defamation must be brought within one year. The district court concluded therefrom that the alleged claim of defamation had been outlawed on the date the present case had been filed.

The federal complaint alleges that this is a "proceeding to redress the violations of rights guaranteed to the plaintiff by the Constitution of the United States. The action arises under the First, Fifth, and Fourteenth Amendments to the Constitution and Sections 1983 and 1985 of Title 42 of the United States Code. . . ." In substance, the allegations of the complaint charge the defendants with an intentional tort which deprived petitioner of her constitutional rights. The author of *Black's Law Dictionary,* Fifth Edition, (1979), defines *intentional tort* as follows:

> Tort or wrong perpetrated by one who intends to do that which the law has declared wrong as contrasted with negligence in which the tortfeasor fails to exercise that degree of care in doing what is otherwise permissible.

It is axiomatic that the character of a cause of action is determined by the allegations contained in the complaint. It is up to the plaintiff, by inserting certain factual allegations, to frame the particular cause of action. The question presented in this respect is: Does the complaint allege a conspiracy among the respondents for the accomplishment of an unlawful purpose in violation of the petitioner's civil rights? Ohio regards the conspiracy for an unlawful purpose, rather than the slander, to be the substantive ground for recovery. Ohio follows the generally accepted doctrine that persons uttering slanders in pursuance of a conspiracy to slander, and all the members of the conspiracy, may be held liable jointly.

The law in Ohio applicable to and dispositive of the issue whether the gist of the present action is one for libel or slander, or whether it is a case of conspiracy to injure a person by libel or slander, is fully set forth in 34 O. Jur. 2d, *Libel and Slander*, Section 129. The author states the rule as follows:

> Action for Conspiracy to Libel or Slander.—The action for conspiracy to injure a person by libel or slander, and the action for libel or slander, are not so identical in character as to bring both into one category under the statute of limitations. The statute limits the bringing of actions for libel and slander to one year from the utterance or publication of the defamatory words, but no section of the statute of limitations so limits the bringing of actions for conspiracy, although the means adopted to accomplish

> the purpose of the conspiracy is libel or slander. In the one case, the libel or slander is the gist of the action, in the other it is a mere incident to the accomplishment of the purpose for which the conspiracy was formed. The conspiracy action, therefore, is not barred by the statute applying to libel or slander.
>
> It has been said that it is probable that the statute of limitations, applying to an action "for an injury to the rights of the plaintiff not arising on contract nor enumerated in" other specified sections of the Code, is applicable to an action for conspiracy to injure a person by libel or slander.[1]

The authority for the foregoing statement is to be found in the decision of the Ohio court in *Zurhorst v. Kroll,* 10 OCC (NS) 228. The first paragraph of the syllabi is especially pertinent to the issue regarding the applicability of the one-year statute of limitation to the instant case. The court held:

> An action for conspiracy to injure one by libel or slander and an action for libel and slander are not so identical in character as to bring them both into one category under the statute of limitations; and where the conspiracy forms the gist of the action and libel or slander is merely incidental to the accomplishment of that purpose, the action is not barred by the statute applying to libel or slander.

The ruling of the court in *Slavinas v. Ambrose,* 27 NP (NS) 279 (Ohio), as set forth in syllabi 1 and 2, is enlightening:

> 1. A suit which charges several defendants with having conspired to injure the good name and standing of the plaintiff by circulating slanderous statements, is an action for conspiracy, notwithstand-

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[1]Ohio Revised Code, Section 2305.09, set forth on page 23 herein.

ing any of the defendants might have been sued separately for slander, and such petition is not open to demurrer for misjoinder of actions or parties.

2. In a petition for conspiracy the plaintiff must recite the illegal acts done by the conspirators and the resulting damage to his person or property.

The Supreme Court of Ohio also had occasion to pronounce itself on the issue herein in the case of *Schoedler v. Gauge & E. Co.*, 134 Ohio St. 78, and held, as follows:

1. Where slander is uttered by one or more persons, pursuant to a conspiracy which included among its purposes the defamation of another, all parties to the conspiracy are jointly liable and may be joined as parties defendant in the same action.

2. Where acts of slander by different parties to a conspiracy are committed on different occasions, in the presence or absence of each other, but pursuant to a common design, they are, in legal contemplation, the joint acts of all.

In the present case, the complaint reveals that the object of the respondents' conspiracy was something more than the slandering of the petitioner. The respondents were agreed and determined to bring about, and did bring about by wrongful means, the termination of the petitioner as a supervisor of education for the Warren City School District Board of Education.

There can be no dispute that the time for filing suit under the Civil Rights Act is controlled by the applicable state statute of limitations. We believe the Ohio statute which governs the instant case is Section 2305.09 of the Revised Code of Ohio. This section in its pertinent part states:

Four years: certain torts.

An action for any of the following causes of action shall be brought within four years after the cause of action accrued;

(D) For an injury to the rights of the plaintiff not arising on contract nor enumerated in sections 2305.10 to 2305.12, inclusive, 2305.04 and 1304.29 of the Revised Code.

The decision of the district court denies a federal forum to a litigant with meritorious and unlitigated constitutional claims, thereby contravening Section 1983's intent and purpose.

The legislative history of the Civil Rights Act, as frequently considered by this Court, evidences a specific Congressional intent to provide a federal remedy to protect a citizen's civil rights even where alternative remedies exist. Congressional concern was centered on the protection of the individual rights, not federalism, judicial recourse, comity, the federal case load or other policies. Congress has never altered its intent to make federal courts the primary protector of constitutional rights through Section 1983. As noted by Justice Douglas:

> The choice made in the Civil Rights Acts of 1870 and 1871 to utilize the federal courts to insure the equal rights of the people was a deliberate one, reflecting a belief that some state courts, which were charged with original jurisdiction in the normal federal-question case, might not be hospitable to claims of deprivation of civil rights. *Whether or not that premise is true today, the fact remains that there has been no alteration of the Congressional intent to make the federal courts the primary protector of the legal rights secured by the Fourteenth and Fifteenth*

> *Amendments and the Civil Rights Acts. Harrison v. NAACP*, 360 U. S. 167, 181 (1959), (Douglas, J., dissenting). (Italics ours.)

The federal-state court relationship, as it is perceived in our situation, was correctly reviewed by Justice Blackmun in the dissenting opinion in Allen and in which he was joined by Justices Brennan and Marshall. Justice Blackmun declared at page 112:

> One should note also that in England v. Medical Examiners, 375 U. S. 411 (1964), the Court had affirmed the federal courts' special role in protecting constitutional rights under Section 1983. . . . The court set out its understanding as to when a litigant in a Section 1983 case might be precluded by prior litigation, holding that "if a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there, and has them decided there and then—whether or not he seeks direct review of the state decision in this Court—he has elected to forego his right to return to the District Court.

With regard to the propriety of the decision below, it should be observed that the litigation of the federal claims in the district court would not be duplicative of the state court effort, since the right and delict in the two cases are utterly different. Moreover, and equally significant, is the fact that the litigation of the federal claims would not be a violation of comity, inasmuch as no state court decision would be superseded. Conceivably, the application of the preclusion doctrine would actually increase the caseload of the federal court. A plaintiff with both a state and federal claim would be compelled to bring both in a federal court if he wanted to litigate the federal claim in the federal court.

The courts below construed the concurrent jurisdiction of the state court in Section 1983 actions to preclude the petitioner from invoking the jurisdiction of the federal court simply because she could have litigated her civil rights claims in the state court. The appropriate response to such a proposition was given in *Thermatron Products, Inc. v. Hermansofer*, 423 U. S. 336, 344 (1976), as follows:

> The argument that a federal right of action, specifically created under Section 1983, may be dismissed because a state remedy to enforce such cause of action is available is even less persuasive than the argument that a diversity case may be dismissed or remanded because the state provides a clear remedy. Thus, the notion that the availability of a state court remedy is a proper basis for abstention is incorrect.

In the field of civil rights, Congress has insured that the complainant be given the right to elect the forum in which he prefers to litigate his claim. It is not the petitioner's position that Section 1983 deprived the state court of jurisdiction over constitutional issues. Certainly, if a plaintiff chooses to bring his Section 1983 action in a state court, nothing in the statute or its legislative history would prevent it. Congress intended, through Section 1983, to provide individuals in petitioner's situation with the opportunity to utilize a federal forum for the protection of their federally secured constitutional rights. This is not to say that if such individuals feel their federal rights can be adequately protected in state courts, they should be compelled to seek federal relief. The choice is that of the complainant to make under Section 1983. On the other hand, to make a federal forum unavailable to the petitioner, as was done in the instant cause, would clearly violate Congressional intent.

> The United States courts are further above mere local influence than the county courts, their judges can act with more independence, cannot be put under terror as local judges can; their sympathies are not so nearly identified with those of the vicinage. . . . We believe we can trust our United States courts, and we propose to do so. Cong. *Globe*, 42 Cong., 1st Sess. 460 (1871). (Remarks of Rep. Coburn.)

Petitioner should be given the opportunity to prove legitimacy of her claim of entitlement to job tenure in light of the circumstances surrounding the discharge.

The district court found that the allegations of the complaint relating to the petitioner's entitlement to employment fail to state a claim upon which relief may be granted. Rule 12(b) (6), Federal Rules of Civil Procedure. The court thereby foreclosed any opportunity for the petitioner to make a showing of the violation of her constitutional rights. The complaint's allegations, which must be construed most favorably to the petitioner at this stage, do raise a genuine issue as to her interest in the continued employment as the Supervisor of Elementary Education. Even though the petitioner did not have tenure, the Civil Rights Act of 1871 gives her a remedy if her contract was not renewed for the school year 1980-1981. Justice Stewart stated in *Perry v. Sinderman*, 408 U. S. 593, 602:

> A teacher, like the respondent, who has held his position for a number of years, might be able to show from the circumstance of this service—and from other relevant facts—that he has a legitimate claim to entitlement to job tenure.

In case of teachers whose contracts are not renewed, tenure is not the critical issue. *Board of Regents v. Roth*, 408

U. S. 564, 582. The declarations of Justice Douglas in Roth are highly significant (pp. 581, 584, 585):

> No more direct assault on academic freedom can be imagined than for school authorities to be allowed to discharge a teacher because of his or her philosophical, political or idealogical beliefs. . . .
>
> The protection of the individual against arbitrary action . . . is the very essence of due process. Slochower v. Bd. of Ed., 350 U. S. 551, 559, but where the State is allowed to act secretly behind closed doors and without any notice to those who are affected by its actions, there is no check against the possibility of such arbitrary action. . . .
>
> Non-renewal of a teacher's contract is tantamount in effect to a dismissal and the consequences may be enormous. Non renewal can be a blemish that turns into a permanent scar and effectively limits any chance the teacher has of being rehired as a teacher, at least in his State.

The constitutional issues raised by the complaint, and heretofore undetermined between the parties, are substantial. The essence of the petitioner's claims is that she incurred the wrath of the respondent board members and others for her vigorous support of certain policies with which the individual respondents disagreed. The decision of the Board not to rehire her, petitioner alleges, was in retaliation for her position as aforestated. The "liberty" and "property" interests implicated in the within cause are secured to the petitioner and protected by the Fourteenth Amendment to the Constitution of the United States. The First Amendment, applicable to the states by reason of the Fourteenth Amendment, also protects the petitioner in her philosophical, political or idealogical beliefs as part of the academic freedom of a teacher. This Court has long

maintained that the constitutional guarantees of the First, Fifth and Fourteenth Amendments are a bulwark against any attack upon academic freedoms, and that these constitutional protections may be invoked against capricious, arbitrary or unreasonable state action.

The decisions of the Court in the area of academic freedom show that the rights of a teacher are especially important and must be dealt with in a scrupulously fair manner by those who are entrusted by law to regulate and to govern the performance and activities of an educator. The Court has pointed out on numerous occasions the importance of the teacher's profession in our democratic society, and the necessity of protecting its personal, associational and academic liberty. "Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always be free to inquire, to study and to evaluate. . . ." *Sweezy v. State of New Hampshire,* 354 U. S. 234, 250 (1957); *Barenblatt v. United States,* 360 U. S. 109 (1959); *Wieman v. Updegraff,* 344 U. S. 183 (1952); *Adler v. Board of Education,* 342 U. S. 485 (1952).

CONCLUSION

The order of the Sixth Circuit Court of Appeals affirming the judgment of the district court should be reversed.

Respectfully submitted,

JOHN R. VINTILLA
FRANCIS X. COOK
112 Plaza West Building
20220 Center Ridge Road
Cleveland, Ohio 44116
(216) 781-3352
Counsel for Petitioner

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